

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

BARBARA A. PLANCK,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 2:06-CV-0543-MHT-SRW
)	
ROBERT GATES, Secretary,)	
Department of Defense,)	
)	
Defendants.)	

**DEFENDANT'S PARTIAL MOTION TO DISMISS,
OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Comes now the defendant, by and through Leura G. Canary, United States Attorney for the Middle District of Alabama and moves this Court to dismiss, or in the alternative grant summary judgment with regard to certain allegations within the complaint, and as grounds states as follows:

1. The Court upon review of the complaint, and with the plaintiff's acquiescence, has set forth the following allegations of discrimination:
 - A) that the defendant discriminated against the plaintiff on the basis of her gender in violation of Title VII when the agency failed to promote her in June 2001 to the position of Quality Assurance Specialist;
 - B) that, in violation of Title VII, defendant retaliated against her for filing an EEO complaint by failing to select her for the position of Safety and Occupational Health Specialist in January 2000;
 - C) that the defendant retaliated against plaintiff in violation of Title VII when it denied her a performance award in September 2001 for the annual rating period ending on December 31, 2000;

- D) that defendant discriminated against her in violation of Title VII on the basis of her color, race, age and sex when it denied her a performance award in September 2001 for the annual rating period ending on December 31, 2000;
- E) that the agency retaliated against plaintiff by subjecting her to improper and unwarranted personnel actions in violation of the Americans with Disabilities Act (“ADA”) between October 1999 and December 2002 because plaintiff engaged in protected activity;
- F) that the agency subjected her to a hostile work environment when other employees referred to her as a “Yankee” and told her that “we don’t do things like that down here”; and
- G) that the agency subjected her to unequal pay on the basis of her gender in violation of the Equal Pay Act between June 1999 and December 2002.

2. The defendant moves for the dismissal, or in the alternative, for summary judgment of claim A) as the plaintiff did not exhaust her administrative remedies and has thus deprived the Court of subject matter jurisdiction.

3. The defendant moves for the dismissal, or in the alternative, for summary judgment of claim B) as the plaintiff did not file the instant lawsuit within 90 days of the final agency administrative decision denying her administrative complaint of discrimination.

4. The defendant moves for the dismissal, or in the alternative, for summary judgment of claim F) as it fails to state a claim upon which relief can be granted “under any set of facts that could be proved consistent with the allegations plaintiff did not exhaust her administrative remedies and has thus deprived the Court of subject matter jurisdiction.” Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229, 2232 (1984), *citing*, Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

5. The defendant moves for the dismissal, or in the alternative, for summary judgment of claim G) as the plaintiff did not file the instant lawsuit within the applicable statute of limitations for claims under the Equal Pay Act, Title 29, United States Code, Section 206.

6. In support of this motion the defendant offers the pleadings which are of record, eleven (11) exhibits attached hereto and a contemporaneously filed memorandum brief.

Respectfully submitted this 29th day of January, 2007.

LEURA G. CANARY
United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and I hereby certify that I have mailed, by United States Postal Service, a copy of same to the following non-CM/ECF participant(s):

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s/R. Randolph Neeley
Assistant United States Attorney